Pop Investments Ltd v iCapital.Biz Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-581–10 OF 2023
ATAN MUSTAFFA J
14 OCTOBER 2024

Civil Procedure — Locus standi — Action by beneficial owner of shares — Foreign entity as beneficial owner of shares in local public listed company filed originating summons against local public listed company seeking injunctive reliefs under s 351 of Companies Act 2016 — Whether beneficial owner had locus standi pursuant to s 351 of Companies Act 2016 — Whether the term 'interest' in s 351 of Companies Act 2016 should include legitimate economic interests — Whether beneficial owner had demonstrated sufficient nexus between local public listed company's alleged contravention of Companies Act 2016 and its claimed interest — Companies Act 2016 ss 56 & 351 — Main Market Listing Requirements Chapter 9

Companies and Corporations — Shares — Shareholding — Prescribed limit on foreign shareholding — Foreign entity as beneficial owner of shares in local public listed company filed originating summons against local public listed company seeking injunctive reliefs under s 351 of Companies Act 2016 — Whether local public listed company required under the law to expressly amend its constitution to incorporate 'prescribed limit' on foreign shareholding, before it could impose 20% restriction on foreign shareholding in company — Companies Act 2016 s 351 — Main Market Listing Requirements rr 7.36(4) & 7.40 — Securities Commission's Guidelines for Public Offerings of Securities of Closed-end Funds — Securities Industry (Central Depositories) (Foreign Ownership) Regulations 1996

Pop Investments Ltd ('Pop'), a foreign entity, was the beneficial shareholder of iCapital.Biz Bhd ('ICAP'), with its shareholding held under a nominee company, Kenanga Nominees (Asing) Sdn Bhd ('KNASB') pursuant to a Global Custodian Agreement dated 26 January 2023. In the present originating summons ('encl 1'), Pop sought for the following reliefs: (a) an injunction to restrain ICAP from imposing, implementing or taking steps to give effect to a 20% 'prescribed limit' on foreign shareholding; (b) a declaration that Pop was entitled to vote at ICAP's members' meetings including the upcoming annual general meeting ('the AGM'); (c) a declaration that ICAP's announcements and statements regarding restriction of foreign shareholders' voting rights were invalid; and (d) if the AGM proceeded with restrictions on

foreign shareholders' voting rights, a declaration that such AGM and any resolutions passed therein were invalid and an order restraining ICAP from implementing any such resolutions. Pop contended that it had the requisite locus standi to bring the present action pursuant to s 351 of the Companies Act 2016 ('the CA 2016'). Pop submitted that as a person whose interests have been, are, or would be affected by ICAP's conduct that contravened or attempted to contravene the CA 2016, it was entitled to seek injunctive relief under s 351 of the CA 2016. The main issue to be determined in the present case was whether ICAP was required under the law to expressly amend its constitution to incorporate a 'prescribed limit' on foreign shareholding, before it could impose a 20% restriction on foreign shareholding in the company. Pending the full disposal of the present originating summons, Pop had filed encl 17 to seek for an inter partes injunction against ICAP for the primary purpose of preserving the status quo by restraining ICAP from imposing and implementing a 20% limit on foreign shareholding, and from restricting the voting rights of foreign shareholders, until the court could fully hear and determine the merits of the case as presented in the originating summons.

Held, dismissing encl 1 with costs of RM25,000 to be paid by Pop to ICAP, and dismissing encl 17 with no order as to costs:

(1) The court found that Pop could rely on s 351 of the CA 2016 to establish legal standing to bring the present action and seek declaratory and injunctive reliefs against ICAP. At this juncture, the court did not have to make a definitive finding on whether Pop's interests have been, are, or would be affected by ICAP's conduct, as long as the issues in controversy related to the question of whether Pop had such interests. The determination of whether Pop's interests have been, are, or would be affected by the conduct would be made substantively at the next stage of the proceedings. The term 'interest' in s 351 should be given a broad interpretation to include legitimate economic interests, such as Pop's beneficial ownership of shares, that were potentially affected by the company's conduct. Pop had demonstrated a sufficient nexus between ICAP's alleged contravention of the CA 2016 and its claimed interest, and the statutory disclosure regime under s 56 of the CA 2016 and Chapter 9 of the Main Market Listing Requirements ('MMLR') supported the recognition of beneficial owners' interests (see paras 44, 46, 69, 74 & 86).

(2) The fact that Pop's interest in the shares arose from a private contractual arrangement with KNASB did not preclude it from relying on s 351 of the CA 2016 to establish legal standing. The statutory language of s 351 did not distinguish between legal and beneficial interests, nor did it exclude interests that arose from private contractual arrangements (see para 66).

(3) The court found that ICAP was not required under the law to expressly amend its constitution to incorporate a prescribed limit on foreign shareholding before imposing a 20% restriction on foreign shareholding in the company. ICAP's existing constitution, particularly para 21(2), read together with the MMLR, the Securities Commission's Guidelines for Public Offerings of Securities of Closed-end Funds, and the Securities Industry (Central Depositories) (Foreign Ownership) Regulations 1996, provided a valid basis for imposing the 20% limit on foreign shareholding. The term 'member' in these provisions should be construed broadly to encompass both local and foreign shareholders, consistent with the objectives of the regulatory framework governing closed-end funds. Further, r 7.40 of the MMLR, which imposed a 20% limit on shareholding in closed-end funds, was deemed to be incorporated into ICAP's constitution by virtue of r 7.36(4) of the MMLR, thereby fortifying ICAP's position. Therefore, the court found that: (a) ICAP's imposition of the 20% limit on foreign shareholding was lawful and did not amount to a breach of its constitution or the CA 2016; and (b) ICAP's announcements and notices regarding the 20% restriction on foreign shareholding and its impact on the voting rights of foreign shareholders were valid (see para 128).

(4) As the court had dismissed the originating summons on its merits, the interim injunction sought in encl 17 had become academic. In addition, the court opined that the court's findings in dismissing the originating summons were equally applicable to encl 17. The court had determined that ICAP's imposition of the 20% limit on foreign shareholding was lawful and did not amount to a breach of its constitution or the CA 2016. This finding directly addressed the core issues raised in encl 17 and demonstrated that there were no serious questions to be tried. The lack of merit in the substantive case, as established in the court's decision on the originating summons, precluded the granting of an interim injunction (see paras 131–132).

[Bahasa Malaysia summary

Pop Investments Ltd ('Pop'), sebuah entiti asing, adalah pemegang saham benefisial iCapital.Biz Bhd ('ICAP'), dengan pegangan sahamnya dipegang di bawah syarikat penama, Kenanga Nominees (Asing) Sdn Bhd ('KNASB') menurut suatu 'Global Custodian Agreement' bertarikh 26 Januari 2023. Dalam saman pemula semasa ('lampiran 1'), Pop ingin mendapatkan relif-relif berikut: (a) injunksi untuk menghalang ICAP daripada mengenakan, melaksanakan atau mengambil langkah untuk memberi kesan kepada 20% 'had yang ditetapkan' ke atas pegangan saham asing; (b) pengisytiharan bahawa Pop berhak mengundi pada mesyuarat ahli-ahli ICAP termasuk mesyuarat agung tahunan yang akan datang ('AGM'); (c) pengisytiharan bahawa pengumuman dan kenyataan ICAP mengenai sekatan hak mengundi

pemegang-pemegang saham asing adalah tidak sah; dan (d) jika AGM tersebut diteruskan dengan sekatan ke atas hak mengundi pemegang-pemegang saham asing, pengisytiharan bahawa AGM tersebut dan apa-apa resolusi yang diluluskan di dalamnya adalah tidak sah dan perintah diberikan bagi menghalang ICAP daripada melaksanakan apa-apa resolusi sedemikian. Pop berhujah bahawa ia mempunyai locus standi yang diperlukan untuk membawa tindakan semasa menurut s 351 Akta Syarikat 2016 ('AS 2016'). Pop berhujah bahawa sebagai orang yang kepentingannya telah, sedang, atau akan terjejas oleh tindakan ICAP yang melanggar atau cuba melanggar AS 2016, ia berhak untuk mendapatkan relif injunksi di bawah s 351 AS 2016. Isu utama yang perlu ditentukan dalam kes semasa ialah sama ada ICAP dikehendaki di bawah undang-undang untuk meminda secara nyata perlembagaannya untuk menetapkan 'had yang ditetapkan' ke atas pegangan saham asing, sebelum ia boleh mengenakan had 20% ke atas pegangan saham asing di dalam syarikat tersebut. Sementara menunggu pelupusan penuh saman pemula ini, Pop telah memfailkan lampiran 17 untuk mendapatkan injunksi inter partes terhadap ICAP bagi tujuan utama mengekalkan status quo dengan menghalang ICAP daripada mengenakan dan melaksanakan had 20% ke atas pegangan saham asing, dan daripada menyekat hak mengundi pemegang-pemegang saham asing, sehingga mahkamah boleh mendengar dan menentukan merit kes yang dikemukakan di dalam saman pemula tersebut secara keseluruhannya.

Diputuskan, menolak lampiran 1 dengan kos sebanyak RM25,000 yang perlu dibayar oleh Pop kepada ICAP, dan menolak lampiran 17 tanpa perintah berkaitan kos:

(1) Mahkamah mendapati bahawa Pop boleh bergantung pada s 351 AS 2016 bagi mewujudkan kedudukan undang-undang untuk membawa tindakan semasa dan mendapatkan relif-relif perisytiharan dan injunksi terhadap ICAP. Pada ketika ini, mahkamah tidak perlu membuat dapatan muktamad sama ada kepentingan Pop telah, sedang, atau akan terjejas oleh tindakan ICAP, selagi mana isu yang menjadi kontroversi adalah berkaitan dengan persoalan sama ada Pop mempunyai kepentingan sedemikian. Penentuan sama ada kepentingan Pop telah, sedang, atau akan terjejas oleh tindakan tersebut akan dibuat secara substantif pada peringkat prosiding seterusnya. Istilah 'kepentingan' dalam s 351 harus diberi tafsiran yang luas untuk memasukkan kepentingan ekonomi yang sah, seperti pemilikan benefisial saham Pop, yang berpotensi terjejas oleh tindakan syarikat tersebut. Pop telah menunjukkan perkaitan yang mencukupi antara ICAP yang didakwa melanggar AS 2016 dan kepentingannya yang dituntut, dan rejim penzahiran berkanun di bawah s 56 AS 2016 dan Bab 9 Kehendak-Kehendak Penyenaraian Pasaran Utama ('KPPU') menyokong pengiktirafan kepentingan pemilik benefisial (lihat perenggan 44, 46, 69, 74 & 86).

(2) Hakikat bahawa kepentingan Pop dalam saham tersebut timbul daripada perjanjian kontrak persendirian dengan KNASB tidak menghalangnya daripada bergantung pada s 351 AS 2016 untuk mewujudkan kedudukan undang-undang. Bahasa berkanun s 351 tidak membezakan antara kepentingan undang-undang dan kepentingan benefisial, dan juga tidak mengecualikan kepentingan yang timbul daripada pengaturan kontrak persendirian (lihat perenggan 66).

(3) Mahkamah mendapati bahawa ICAP tidak dikehendaki di bawah undang-undang untuk meminda perlembagaannya secara nyata untuk memasukkan had yang ditetapkan ke atas pegangan saham asing sebelum mengenakan sekatan 20% ke atas pegangan saham asing dalam syarikat tersebut. Perlembagaan sedia ada ICAP, khususnya perenggan 21(2), dibaca bersama KPPU, Garis Panduan Suruhanjaya Sekuriti untuk Tawaran Awam Sekuriti Dana Tertutup, dan Peraturan-Peraturan Perindustrian Sekuriti (Depositori Pusat) (Pemunyaan Asing) 1996, menyediakan asas yang sah untuk mengenakan had pegangan asing 20%. Istilah 'ahli' dalam peruntukan-peruntukan ini harus ditafsirkan secara meluas untuk merangkumi kedua-dua pemegang saham tempatan dan asing, selaras dengan objektif rangka kerja pengawalseliaan yang mengawal dana tertutup. Selanjutnya, k 7.40 KPPU, yang mengenakan had 20% ke atas pegangan saham dalam dana tertutup, telah dianggap sebagai dimasukkan ke dalam perlembagaan ICAP berdasarkan k 7.36(4) KPPU, dan ini mengukuhkan lagi kes ICAP. Oleh itu, mahkamah mendapati bahawa: (a) pengenaan had 20% oleh ICAP ke atas pegangan saham asing adalah sah dan tidak melanggar perlembagaannya atau AS 2016; dan (b) pengumuman dan notis ICAP mengenai sekatan 20% ke atas pegangan saham asing dan kesannya terhadap hak mengundi pemegang-pemegang saham asing adalah sah (lihat perenggan 128).

(4) Memandangkan mahkamah telah menolak saman pemula tersebut pada meritnya, injunksi interim yang diminta dalam lampiran 17 telah menjadi akademik. Di samping itu, mahkamah berpendapat bahawa keputusan mahkamah dalam menolak saman pemula tersebut turut terpakai ke atas lampiran 17. Mahkamah telah memutuskan bahawa pengenaan had 20% oleh ICAP ke atas pegangan saham asing adalah sah dan tidak melanggar perlembagaannya atau AS 2016. Dapatan ini secara langsung membincangkan isu utama yang dibangkitkan dalam lampiran 17 dan menunjukkan bahawa tidak terdapat persoalan-persoalan yang serius untuk dibicarakan. Kekurangan merit dalam kes substantif, seperti yang ditetapkan dalam keputusan mahkamah mengenai saman pemula tersebut, menghalang pemberian injunksi interim (lihat perenggan 131–132).]

Cases referred to

Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd (1997) 148 ALR 339, FC (folld)
Australian Conservation Foundation Inc v Commonwealth (1980) 146 CLR 493, HC (folld)
Broken Hill Proprietary Co Ltd v Bell Resources Ltd (1984) 8 ACLR 609, SC (folld)
QIW Retailers Ltd v Davids Holdings Pty Ltd and others (1992) 109 ALR 377, FC (refd)
Waterhouse v Waterhouse and Ors (1998) 148 FLR 312, SC (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 2(1), 377
Companies Act 2016 ss 36, 36(1), (2), 56, 71, 71(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), 136(2), 292, 351 351(1)
Corporations Act 2001 [AU] s 1324
Futures Industry Act 1993 (repealed by Capital Markets and Services Act 2007)
Interpretation Acts 1948 and 1967 s 4(3)
Securities Commission Malaysia Act 1993 s 15
Securities Industry (Central Depositories) (Foreign Ownership) Regulations 1996 regs 2, 5, 6
Securities Industry (Central Depositories) Act 1991 s 9
Securities Industry Act 1983 (repealed by Capital Markets and Services Act 2007)
Trade Practices Act 1974 s 80

Jack Yow (Cassandra Oh with him) (Rahmat Lim & Partners) for the plaintiff.
Loh Siew Cheang (Nigel William Kraal, Claudia Nyon and Chai Pei Xian with him) (Cheang & Ariff) for the defendant.

Atan Mustaffa J:

[1] This judgment concerns an application by a beneficial shareholder of a public listed company for declaratory and injunctive relief against the company's imposition of a 20% limit on foreign shareholding. The applicant, a foreign entity, held shares in the company through a nominee arrangement at the time of filing the application. The company had made a series of announcements regarding the implementation of the 20% foreign shareholding limit, citing various regulations and guidelines as the basis for its actions. The applicant contended that the company's imposition of this limit without amending its constitution was unlawful and in breach of the Companies Act 2016. Central to the dispute were questions of the applicant's legal standing to bring the action, the interpretation of relevant securities regulations, and the interplay between the company's constitution and the

regulatory framework governing closed-end funds in Malaysia. The case also raised important issues regarding the rights of beneficial shareholders and the scope of s 351 of the Companies Act 2016. Additionally, the court was tasked with determining whether the company was required to expressly amend its constitution to incorporate a prescribed limit on foreign shareholding before imposing such a restriction. This judgment addresses these complex issues within the broader context of corporate governance, securities regulation, and shareholder rights in Malaysia.

BACKGROUND FACTS

[2] Pop Investments Ltd ('Pop'), a company incorporated in the Isle of Man, filed an originating summons against iCapital.Biz Bhd ('ICAP'), a public listed company in Malaysia, on 24 October 2023.

[3] At the time of filing, Pop was the beneficial shareholder of ICAP, with its shareholding held under nominee companies Kenanga Nominees (Asing) Sdn Bhd ('KNASB') and Canaccord Genuity Wealth (International) Ltd. Specifically, 1,279,600 shares in ICAP were held by KNASB as a nominee for Pop under a Global Custodian Agreement dated 26 January 2023.

[4] ICAP made a series of announcements and statements regarding a 20% prescribed limit on foreign shareholding over the course of September 2023. These communications were made through various channels, including official announcements to Bursa Malaysia, the company's notice of Annual General Meeting and its 2023 Annual Report.

[5] On 8 September 2023, ICAP made its first announcement to Bursa Malaysia titled 'Lodgement to Bursa Malaysia Depository on Foreign Ownership Limit Pursuant to the Securities Industry (Central Depositories) (Foreign Ownership) Regulations 1996 and Rules of Bursa Malaysia Depository'. In this announcement, ICAP stated that it is subject to the 'prescribed limit' as defined under Securities Industry (Central Depositories) (Foreign Ownership) Regulations 1996 ('the SICDA FOR') and Rules of Bursa Malaysia Depository ('the BMD Rules'), and that the fund is classified by Bursa Malaysia or Bursa Malaysia Depository Sdn Bhd as being imposed with a 'prescribed limit'. Importantly, ICAP declared that the 'prescribed limit' of the fund is 20% on foreign shareholding in ICAP.

[6] A week later, on 15 September 2023, ICAP made a second announcement to Bursa Malaysia, referencing the first announcement. This communication provided further context, stating that the purpose of the first announcement was to notify existing foreign shareholders of ICAP's compliance with SICDA FOR and BMD Rules. It also specified that the

percentage threshold of the prescribed limit is as per para 7.40 of the Main Market Listing Requirements ('MMLR') and para 3.7.1(iii) of the Securities Commission's Guidelines for Public Offerings of Securities of Closed-end Funds ('SC CEF Guidelines'). ICAP asserted that it had taken necessary actions to comply with regs 5 and 6 of SICDA FOR, read together with r 24A.05(1) of the BMD Rules.

[7] ICAP's third announcement to Bursa Malaysia came on 29 September 2023. This announcement focused on the rights of foreign shareholders, stating that they are entitled to rights and obligations attached to their shares based on the last in, first out ('LIFO') method. It also noted that foreign shareholders' entitlement to their rights and obligations will be determined under reg 6 of SICDA FOR if the 'prescribed limit' is breached.

[8] On the same day as the third announcement, ICAP issued its notice of Annual General Meeting dated 29 September 2023. This notice contained a significant statement regarding voting rights, specifying that only foreign depositors who hold voting shares within the prescribed limit of 20% shall be entitled to vote at the meeting.

[9] Finally, in ICAP's 2023 Annual Report, an 'Explanation of SICDA FOR' was provided on page three. This explanation reiterated the 20% prescribed limit on foreign shareholding, further solidifying ICAP's stance on the matter.

[10] These multiple communications, made through various official channels, collectively indicated ICAP's intention to implement a 20% limit on foreign shareholding. Throughout these announcements and statements, ICAP consistently cited various regulations and guidelines as the basis for this action.

[11] On 24 October 2023, Pop filed an originating summons in encl 1 against ICAP seeking injunctive relief to prevent ICAP from imposing a 20% limit on foreign shareholding, declaratory orders regarding Pop's voting rights and the validity of ICAP's announcements, and potential invalidation of the upcoming Annual General Meeting ('AGM') if foreign shareholders' voting rights are restricted.

[12] On 24 October 2023, Pop filed a notice of application in encl 2 for an ex parte injunction seeking to restrain ICAP from imposing the 20% foreign shareholding limit, impeding foreign shareholders' voting and other rights, and making further announcements about the limit without altering its constitution via special resolution pending an inter partes hearing.

[13] On 31 October 2023, Pop obtained the ex parte order for an interim

injunction against ICAP. ICAP filed an application on 3 November 2023 to set aside this ex parte order, which was dismissed by the court on the same day.

[14] ICAP's Annual General Meeting proceeded on 4 November 2023 in compliance with the terms of the ex parte order.

[15] On 1 November 2023, Pop filed a notice of application in encl 17 against ICAP, seeking injunctive reliefs to restrain ICAP from imposing a 20% foreign shareholding limit, impeding foreign shareholders' voting and other rights under the Companies Act 2016, and making further announcements about the limit without a special resolution, pending full disposal of the originating summons.

[16] On 10 November 2023, after an inter partes hearing, the court granted an ad interim injunction on the same terms as the ex parte order, pending full disposal of the originating summons.

[17] On 7 December 2023, more than a month after the originating summons was filed, KNASB transferred the 1,279,600 ICAP shares it held as nominee to Pop directly. Pop became a registered shareholder of ICAP at this point.

POP'S ORIGINATING SUMMONS (ENCL 1)

[18] In Pop's originating summons against ICAP, several declaratory orders and injunctive relief were sought. The main prayers sought were: (a) an injunction to restrain ICAP from imposing, implementing or taking steps to give effect to a 20% 'prescribed limit' on foreign shareholding; (b) a declaration that Pop is entitled to vote at ICAP's members' meetings including the upcoming AGM; (c) a declaration that ICAP's announcements and statements regarding restriction of foreign shareholders' voting rights are invalid; and (d) if the AGM proceeds with restrictions on foreign shareholders' voting rights, a declaration that such AGM and any resolutions passed therein are invalid and an order restraining ICAP from implementing any such resolutions.

[19] The grounds for the originating summons were that: (a) ICAP's announcements and statements regarding the 20% foreign shareholding limit were false and misleading; (b) SICDA FOR and BMD Rules do not allow ICAP to impose such a limit without first incorporating it into its constitution; (c) ICAP has acted in breach of its constitution, which does not provide for such a foreign shareholding limit; and (d) ICAP has acted in breach of the Companies Act 2016 ('the CA 2016') by attempting to impose the limit without altering its constitution via a special resolution as required under ss 36 and 292 of the CA 2016.

POP'S APPLICATION FOR INTERIM INJUNCTION IN ENCL 17

[20] The notice of application in encl 17 was filed by Pop against ICAP, to seek injunctive reliefs pending the full disposal of the originating summons. The main prayers sought were for injunctions to restrain ICAP from: (a) imposing or implementing a 20% 'prescribed limit' on foreign shareholding; (b) removing, restricting, or impeding the voting rights of foreign shareholders at members' meetings, including the upcoming AGM on 4 November 2023; (c) removing, restricting, or impeding any other rights of foreign shareholders under ss 71(1)(a) to (1)(e) of the CA 2016; and (d) making further announcements regarding the imposition of a 'prescribed limit' on foreign shareholding without passing a special resolution to alter its constitution. These injunctive reliefs were sought to maintain the status quo until the court could fully hear and determine the merits of the case as presented in the originating summons.

[21] The grounds for the notice of application were essentially the same as those presented in the originating summons. In summary, ICAP's announcements regarding the 20% foreign shareholding limit were false and misleading, such a limit is not allowed without amending ICAP's constitution, ICAP breached its constitution and the CA 2016 by failing to pass a special resolution, there are serious issues to be tried, damages would not adequately compensate for the loss of voting rights, and the balance of convenience favors an injunction to prevent ICAP from bypassing statutory requirements.

PROCEDURAL HISTORY

[22] This action began on 24 October 2023 when Pop filed the originating summons (encl 1) and an ex parte application for an injunction (encl 2) against ICAP. Enclosure 2 sought to restrain ICAP from imposing, implementing, or taking steps to enforce a 20% 'prescribed limit' on foreign shareholding, which Pop argued was not properly authorised under various regulations and guidelines. The application also aimed to prevent ICAP from restricting or impeding the voting rights of foreign shareholders at the upcoming AGM on 4 November 2023 and in future meetings. Additionally, it sought to stop ICAP from making further announcements about this limit without passing a special resolution to alter the company's constitution.

[23] On 31 October 2023, the court granted the ex parte injunction as requested in encl 2, pending an inter partes hearing. In response, on 3 November 2023, ICAP filed an application (encl 19) to set aside this ex parte injunction order. However, the court dismissed this application, ruling that Pop had locus standi to bring the action under s 351 of the CA 2016.

[24] On 1 November 2023, Pop filed the inter partes application for injunction in encl 17 as explained above.

[25] ICAP filed an application (encl 24) on 3 November 2023 to strike out Pop's originating summons, but this was withdrawn on 10 November 2023. At this point, the court ordered the parties to file affidavits and written submissions in preparation for the hearing of the originating summons (encl 1) and the inter partes injunction application (encl 17) to be heard together. The ex parte injunction was extended until the disposal of these applications.

[26] Enclosures 1 and 17 were heard on 16 January 2024 and 4 March 2024.

Enclosure 1

Pop's submissions

[27] Pop contends that it has the requisite legal standing (locus standi) to seek the reliefs specified in the originating summons. This standing, according to Pop, stems from two primary factors: its undisputed status as ICAP's shareholder and the fact that its reliefs were sought pursuant to s 351 of the CA 2016 and the inherent jurisdiction of the court.

[28] Pop argues that at the time of filing the originating summons, the 1,279,600 shares in ICAP were held by KNASB as a nominee of Pop under a global custodian agreement. Under this agreement, KNASB held the shares as a bare trustee and/or agent of Pop, required to act in accordance with Pop's instructions, including voting at ICAP's members' meetings. In Pop's view, it was at all material times the beneficial owner and deemed registered owner of the shares.

[29] Pop asserts that ICAP should not be allowed to deny Pop's status as a shareholder, given that ICAP has recognised Pop as one of its 'Thirty Largest Shareholders' in its annual report. Furthermore, Pop points out that ICAP's application to set aside the ex parte interim injunction granted on 31 October 2023 indicates ICAP's acknowledgment that the 20% prescribed limit on foreign shareholding was applicable to Pop.

[30] Pop maintains that it has the requisite locus standi to seek relief under s 351 of the CA 2016, which provides that 'a person whose interests have been, are or would be affected' by a conduct constituting a contravention of or an attempt to contravene the CA 2016 may apply for injunctive relief. Pop highlights the court's decision on 3 November 2023, which found that Pop, as a beneficial owner of the shares, had the requisite locus standi to bring forth this action under s 351.

[31] In Pop's view, ICAP's reliance on the SICDA FOR and BMD Rules is misplaced. Pop argues that these regulations do not allow ICAP to impose restrictions on foreign ownership of shares without first incorporating such limits into ICAP's constitution. Pop contends that ICAP has misconstrued these regulations by equating them with para 21(2) of ICAP's constitution, which Pop argues is not a prescribed limit on foreign shareholding but rather a limit for maximum shareholding for a single registered member.

[32] Pop alleges that ICAP has acted in breach of its constitution by imposing the 20% prescribed limit on foreign shareholding despite not having an express clause providing for such a limit. Furthermore, Pop argues that ICAP has acted in breach of the CA 2016 by failing to pass a special resolution to alter its constitution before imposing the 20% prescribed limit on foreign shareholding, and by depriving foreign shareholders of their right to vote at members' meetings.

[33] Finally, Pop emphasises that as of 7 December 2023, it has become a registered shareholder of ICAP following the transfer of shares from KNASB to Pop. Pop argues that this transfer renders the issue of its locus standi to bring forth the suit academic and moot.

ICAP's submissions

[34] ICAP submits that Pop lacks the requisite standing to file the originating summons as it was not a registered shareholder at the time of filing on 24 October 2023. ICAP argues that the subsequent transfer of shares to Pop on 7 December 2023 does not retrospectively confer standing.

[35] ICAP contends that Pop's assertion of being an 'undisputed shareholder' is unfounded. ICAP points out that the disclosure of Pop's name below KNASB in the annual report is merely a mandatory disclosure requirement under the MMLR, and does not confer shareholder status.

[36] ICAP maintains that the Global Custodian Agreement between Pop and KNASB is irrelevant to the present proceedings. ICAP argues that private contractual arrangements cannot supplant statutory provisions governing shareholder rights and company obligations.

[37] ICAP asserts that s 351 of the CA 2016 does not confer freestanding locus standi. ICAP argues that the term 'interest' in this section refers to a head of recognised interest protected under the CA 2016, which does not include beneficial or economic interest in shares.

[38] ICAP contends that there has been no contravention of the CA 2016 or

A the SC CEF Guidelines and MMLR. ICAP argues that its constitution, particularly para 21(2), already incorporates the 20% foreign shareholding limit required under the SICDA FOR.

B **[39]** ICAP maintains that it is not required to amend its constitution to comply with SICDA FOR and the BMD Rules on foreign shareholdings. ICAP argues that the word 'member' in its constitution is broad enough to include both Malaysian and non-Malaysian members, and therefore no explicit mention of 'foreign' shareholders is necessary.

C **[40]** ICAP asserts that Pop's case is built on speculation and assumptions. ICAP points out that Pop has failed to demonstrate which part of its shareholding, if any, would be affected by the purported 20% prescribed limit on foreign shareholding.

D **[41]** Finally, ICAP argues that the ex parte order obtained by Pop on 31 October 2023 was provisional in nature and does not bind the court in subsequent proceedings. ICAP contends that there is no need for an appeal against such an order, as it can be reviewed in light of full arguments from both E parties.

ANALYSIS AND FINDINGS OF THE COURT

Pop Investments Ltd's legal standing (locus standi) to bring this action

F **[42]** Pop contends that it has the requisite legal standing, or locus standi, to bring this action and seek declaratory and injunctive reliefs against ICAP, pursuant to s 351 of the CA 2016. Pop submits that as a person whose interests have been, are, or would be affected by ICAP's conduct that contravenes or G attempts to contravene the CA 2016, it is entitled to seek injunctive relief under s 351.

[43] In response, ICAP argues that Pop's reliance on s 351 of the CA 2016 to establish locus standi is misplaced. ICAP contends that s 351 does not confer H freestanding locus standi upon all persons, and that the term 'interest' in the provision must refer to a recognised or protected head of interest under the CA 2016. ICAP submits that Pop's beneficial or economic interest in the shares is not a recognised or protected head of interest, as it is a private matter that does not concern the company.

I **[44]** Having carefully considered the submissions of both parties and the applicable legal provisions, I find that s 351 of the CA 2016 provides Pop with legal standing to bring this action and seek declaratory and injunctive reliefs against ICAP.

[45] Firstly, a plain reading of s 351(1) of the CA 2016 makes it abundantly clear that the provision allows a person whose interests have been, are, or would be affected by a company's conduct that contravenes or attempts to contravene the CA 2016 to seek injunctive relief. Section 351(1) states:

> Where a person has engaged, is engaging or intends to engage in conduct that constituted, constitutes or would constitute —
>
> (a) a contravention of this Act;
>
> (b) an attempt to contravene this Act;
>
> ...
>
> the Court may, on the application of the Registrar, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

[46] The language employed in the provision is unambiguous and unequivocal in conferring the right to seek injunctive relief upon a person whose interests are affected by a company's contravening conduct. The term 'interest' in this context should be given a broad and liberal interpretation to include not only strict legal or proprietary interests but also legitimate economic, commercial, or business interests that are directly and adversely affected by the company's conduct.

[47] A narrow construction of the term 'interest' that is limited to only legal or proprietary interests would unduly restrict the scope and application of s 351 and would be contrary to the legislative intent of providing a wide statutory remedy to protect the interests of various stakeholders against a company's contravening conduct. The broad interpretation of 'interest' is necessary to give full effect to the statutory purpose of s 351 in promoting corporate compliance and protecting the legitimate interests of persons dealing with or affected by the company's actions.

[48] This broad interpretation of 'interest' under s 351 finds strong support in the Australian case law, given that s 351 of the CA 2016 was modelled after s 1324 of the Australian Corporations Act 2001.

[49] In the case of *Broken Hill Proprietary Co Ltd v Bell Resources Ltd* [1984] 8 ACLR 609, the Supreme Court of Victoria interpreted the term 'interest' in a provision similar to s 351 of the CA 2016. The court held that the interests referred to in the provision are 'interest of any person (which includes a corporation) which go beyond the mere interest of a member of the public'. This holding clearly indicates that the term 'interest' should not be

narrowly construed and extends beyond a mere general interest that any member of the public may have.

[50] The court in *Broken Hill Proprietary* further clarified that it is not necessary for the applicant to show personal rights of a proprietary nature or any special injury arising from a breach of the statute. This clarification is significant as it establishes that the applicant need not have a strict legal or proprietary interest, nor suffer any special injury, to have standing under the provision. It is sufficient for the applicant to demonstrate an interest that goes beyond that of a mere member of the public.

[51] The principles enunciated in *Broken Hill Proprietary* have been consistently applied and followed in subsequent Australian cases, such as *Waterhouse v Waterhouse and Ors* [1998] 148 FLR 312, thereby reinforcing the broad interpretation of the term 'interest' in the context of statutory provisions similar to s 351 of the CA 2016.

[52] Given the persuasive value of the Australian case law and the similarity in the statutory language, the court agrees that that the broad interpretation of 'interest' adopted in *Broken Hill Proprietary* and its progeny should be applied to s 351 of the CA 2016. This approach ensures consistency in the interpretation of the provision and gives effect to the legislative intent of providing a wide statutory remedy to protect the interests of persons affected by a company's contravening conduct.

[53] Similarly, in *QIW Retailers Ltd v Davids Holdings Pty Ltd and others* [1992] 109 ALR 377, the Federal Court of Australia provided further guidance on the interpretation of the term 'interest' in the context of statutory provisions similar to s 351 of the CA 2016. The court held that a person is considered to have an interest affected if they are likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle, or winning a contest, if their action succeeds, or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if their action fails.

[54] This holding is significant as it establishes a test for determining whether a person has a sufficient interest to seek injunctive relief under the relevant statutory provision. The test is based on the likelihood of the person gaining an advantage or suffering a disadvantage as a result of the outcome of the action, beyond mere emotional or moral satisfaction.

[55] The court applied the test for standing from *Australian Conservation Foundation Inc v Commonwealth* [1980] 146 CLR 493, a decision of the High Court of Australia, which states that a person has the required 'interest' if 'he is likely to gain some advantage, other than the satisfaction of righting a wrong,

upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails'. A

[56] The test laid down above is particularly relevant in the context of s 351 of the CA 2016, as it provides a clear and pragmatic approach to assessing whether a person's interest is affected by a company's contravening conduct. The test ensures that only persons with a genuine and substantial interest in the outcome of the action are granted standing to seek injunctive relief under the provision. It is evident that Pop, as a beneficial shareholder of ICAP, stands to gain a tangible advantage if its action succeeds, in the form of the protection of its economic interests and the preservation of its voting rights as a shareholder. Conversely, if the action fails, Pop is likely to suffer a real disadvantage, as its economic interests and voting rights would be adversely affected by ICAP's contravening conduct. B C D

[57] Applying the principles established in the Australian case law to the present case, it is abundantly clear that Pop, as a beneficial shareholder of ICAP, has a legitimate and substantial economic interest in ensuring that ICAP complies with the provisions of the CA 2016 and does not engage in conduct that contravenes or attempts to contravene the CA 2016. Pop's beneficial ownership of shares in ICAP, though held through its nominee KNASB, confers upon it a direct and tangible economic stake in the company. E

[58] As a beneficial shareholder, Pop has a vested interest in the proper management and governance of ICAP, and in ensuring that the company acts within the confines of the law. Pop's economic interests are inextricably linked to the financial performance and market value of ICAP, which can be significantly impacted by the company's compliance with statutory obligations and adherence to good corporate governance practices. F G

[59] ICAP's imposition of the 20% limit on foreign shareholding and the consequent restriction on the voting rights of foreign shareholders, without proper amendments to its constitution, has the potential of directly and adversely affecting Pop's economic interests as a shareholder. By unilaterally imposing such restrictions, ICAP will potentially dilute the value of Pop's shareholding and undermine its ability to participate in the governance of the company through the exercise of its voting rights. H

[60] The imposition of the 20% limit on foreign shareholding, without amending the constitution as required under s 36 of the CA 2016, may contravene the CA 2016. Section 36(1) of the CA 2016 states: I

> Subject to the provisions of this Act, the constitution of a company may be altered or amended by a special resolution.

[61] Section 36(2) further provides:

> A company shall notify the Registrar of any alteration or amendment to its constitution and the Registrar shall record the alteration or amendment.

[62] By allegedly failing to comply with the mandatory requirements of s 36, ICAP may have acted in a manner that is contrary to the provisions of the CA 2016. This potentially contravening conduct directly impacts Pop's economic interests, as it could effectively allow ICAP to unilaterally alter the terms of the contract between the company and its shareholders, as embodied in the Constitution, without following the proper legal process.

[63] Moreover, the possible restriction on the voting rights of foreign shareholders, which flows from the imposition of the 20% limit, might violate s 71 of the CA 2016, which guarantees the right of every member to vote at general meetings. Section 71 states:

> Subject to the constitution, a member of a company shall have the right to attend, participate, speak and vote at a meeting of members of the company.

[64] If foreign shareholders are potentially denied the right to vote based on the improperly imposed 20% limit, ICAP could be acting in direct contravention of s 71, thereby potentially infringing upon Pop's statutory rights as a shareholder.

[65] The direct and adverse impact of ICAP's conduct on Pop's economic interests and statutory rights as a shareholder clearly demonstrates that Pop has a legitimate and substantial interest in seeking injunctive relief under s 351 of the CA 2016. Pop's interest goes beyond a mere general interest of a member of the public, and is directly tied to its status as a beneficial shareholder of ICAP.

[66] The fact that Pop's interest in the shares arises from a private contractual arrangement with KNASB under the Global Custodian Agreement dated 26 January 2023 does not preclude it from relying on s 351 of the CA 2016 to establish legal standing. The statutory language of s 351 does not distinguish between legal and beneficial interests, nor does it exclude interests that arise from private contractual arrangements.

[67] Section 351(1) of the CA 2016 broadly refers to 'a person whose interests have been, are or would be affected by the conduct' of a company that contravenes or attempts to contravene the CA 2016. The provision does not qualify the term 'interest' with any adjectives such as 'legal', 'proprietary', or 'direct', indicating that the legislature intended for the term to be given a wide and inclusive interpretation.

[68] The fact that Pop's interest in the shares is rooted in a private contractual arrangement with KNASB does not diminish the legitimacy or substantiality of its interest. The Global Custodian Agreement, being a legally binding contract, confers upon Pop a valid and enforceable right to the beneficial ownership of the shares. This beneficial interest, though not a direct legal interest, represents a genuine economic stake in ICAP and is sufficient to bring Pop within the purview of s 351.

[69] Furthermore, the statutory disclosure regime under s 56 of the CA 2016 and Chapter 9 of the MMLR recognises the interest and standing of beneficial shareholders like Pop. This recognition lends strong support to the view that beneficial owners of shares have a legitimate interest in ensuring that the company acts in accordance with its constitution and the applicable laws and regulations.

[70] Section 56 of the CA 2016, which deals with the disclosure of beneficial ownership of shares, states:

> (1) A company may by notice in writing require any member of the company within such reasonable time as is specified in the notice —
>
> (a) to inform the company whether the member holds any voting shares in the company as beneficial owner or as trustee; and
>
> (b) if the member holds the voting shares as trustee, to indicate so far as the member can the persons for whom the member holds the voting shares by name and by other particulars sufficient to enable those persons to be identified and the nature of their interest.

[71] This provision clearly recognises the existence and importance of beneficial ownership of shares, distinct from legal or registered ownership. By empowering companies to require members to disclose their beneficial ownership, the CA 2016 acknowledges that beneficial owners have a stake in the company and that their interests are relevant to the company's affairs.

[72] Similarly, chapter 9 of the MMLR, which sets out the continuing disclosure obligations of listed issuers, includes several provisions that recognise the interest of beneficial owners of shares. For instance, para 9.19(6) of the MMLR requires a listed issuer to immediately announce to the Exchange any notice relating to substantial shareholding which the listed issuer has received. The term 'substantial shareholder' is defined in s 136(2) of the CA 2016 to include a person who has an interest or interests in one or more voting shares in a company and the nominal amount of that share, or the aggregate of the nominal amounts of those shares, is not less than 5% of the aggregate of the nominal amounts of all the voting shares in the company. This

definition encompasses both direct and indirect interests in the shares, which include beneficial interests.

[73] Paragraph 9.25 of the MMLR further requires a listed issuer to disclose in its annual report the names of the substantial shareholders and their direct and indirect shareholdings. This disclosure obligation extends to beneficial owners who hold their shares through nominees or other intermediaries.

[74] The statutory disclosure regime under the CA 2016 and MMLR which recognises and requires the disclosure of beneficial ownership of shares, supports the view that beneficial owners have a legitimate interest in the proper management and governance of the company. This recognition is premised on the understanding that beneficial owners, though not the registered legal owners, have a genuine economic stake in the company and are affected by the company's actions and decisions.

[75] The disclosure obligations imposed by these statutory and regulatory provisions ensure transparency and enable beneficial owners to monitor the company's affairs and to take appropriate action if their interests are adversely affected. This is particularly relevant in the context of s 351 of the CA 2016, which allows a person whose interests are affected by a company's contravening conduct to seek injunctive relief.

[76] The recognition of the interest of beneficial owners under the disclosure regime lends credence to the argument that Pop, as a beneficial shareholder of ICAP, has a legitimate interest in ensuring that the company complies with its constitution and the applicable laws and regulations. Pop's interest, though not a registered legal interest, is nonetheless a valid and substantial economic interest that is recognised and protected by the statutory and regulatory framework.

[77] Moreover, Pop has demonstrated a sufficient nexus between ICAP's alleged contravention of the CA 2016 and its claimed interest, consistent with the principles established in Australian case law. In the Australian Federal Court case of *Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd* [1997] 148 ALR 339, Justice Merkel discussed the limitations on the court's power to grant injunctive relief under s 80 of the Trade Practices Act 1974 (Cth).

[78] Justice Merkel noted at ALR 343 that 'there must be a nexus between the conduct alleged or found to constitute the relevant contraventions and the injunctions granted'. He stated:

respective of whether the injunction is sought or granted under s 80(1) or s 80(1AA), there must be a nexus between the conduct alleged or found to constitute the relevant contraventions and the injunctions granted.

[79] Applying this principle to the present case, it is evident that there is a clear nexus between ICAP's alleged contraventions of the CA 2016 and Pop's claimed interest as a beneficial shareholder. ICAP's imposition of the 20% limit on foreign shareholding and the consequent restriction on the voting rights of foreign shareholders, without amendments to its constitution, directly affect Pop's rights and interests as a beneficial owner of shares in ICAP.

[80] By unilaterally imposing the 20% limit on foreign shareholding without amending its constitution under s 36 of the CA 2016, ICAP has potentially contravened the CA 2016. Section 36(1) states:

A company having a constitution may, by a special resolution, alter or amend its constitution unless the constitution itself prohibits the alteration or amendment.

[81] ICAP's not amending its constitution before imposing the 20% limit on foreign shareholding may constitute a breach of s 36, which directly impacts Pop's interests as a beneficial shareholder.

[82] Furthermore, the consequent restriction on the voting rights of foreign shareholders, including Pop, flowing from the imposition of the 20% limit, potentially contravenes s 71 of the CA 2016, which guarantees the right of every member to vote at general meetings.

[83] ICAP's conduct in restricting the voting rights of foreign shareholders without proper basis or authority under its constitution or the CA 2016 may directly infringe upon Pop's statutory rights as a member of the company.

[84] The direct and substantial impact of ICAP's contraventions on Pop's rights and interests as a beneficial shareholder satisfies the nexus requirement established in *Z-Tek Computer* and other Australian cases. The effect on Pop's interests is not remote, speculative, or insubstantial, but rather is a real and tangible consequence of ICAP's conduct in possibly breaching ss 36 and 71 of the CA 2016.

[85] This nexus between ICAP's contravening conduct and the impact on Pop's interests further reinforces Pop's entitlement to seek injunctive relief under s 351 of the CA 2016. The satisfaction of the nexus requirement, as articulated in the Australian case law, strengthens Pop's case for establishing legal standing under s 351 and underscores the legitimacy of its claim for injunctive relief against ICAP's contraventions of the CA 2016.

[86] In conclusion, based on the reasons set out above, I find that Pop can rely on s 351 of the CA 2016 to establish legal standing to bring this action and seek declaratory and injunctive reliefs against ICAP. At this juncture, the court does not have to make a definitive finding on whether Pop's interests have been, are, or would be affected by ICAP's conduct, as long as the issues in controversy relate to the question of whether Pop has such interests. The determination of whether Pop's interests have been, are, or would be affected by the conduct will be made substantively at the next stage of the proceedings. The term 'interest' in s 351 should be given a broad interpretation to include legitimate economic interests, such as Pop's beneficial ownership of shares, that are potentially affected by the company's conduct. Pop has demonstrated a sufficient nexus between ICAP's alleged contravention of the CA 2016 and its claimed interest, and the statutory disclosure regime supports the recognition of beneficial owners' interests. Given that s 351 provides a sufficient basis for Pop to establish legal standing in this matter, it is not necessary for this court to consider the other grounds advanced by Pop to argue its legal standing. Consequently, the court will now proceed to consider the substantive issue of whether ICAP's imposition of the 20% limit on foreign shareholding, without amending its constitution, is in breach of the CA 2016.

Requirement to expressly amend ICAP's constitution to incorporate a 'prescribed limit' on foreign shareholding, before imposing a 20% restriction on foreign shareholding in the company

[87] The central issue to be determined in this originating summons application is whether ICAP is required under the law to expressly amend its constitution to incorporate a 'prescribed limit' on foreign shareholding, before it can impose a 20% restriction on foreign shareholding in the company.

[88] Pop submits that ICAP cannot rely on the SICDA FOR and the BMD Rules to impose a 20% limit on foreign shareholding without first incorporating such a limit in its constitution. Pop contends that reg 2 of the SICDA FOR defines 'prescribed limit' as a limit imposed by the issuer's memorandum and articles of association or any other constituent document, and since ICAP's constitution does not contain such a provision, ICAP must amend its constitution by passing a special resolution under s 36 read with s 292 of the CA 2016 before enforcing the limit.

[89] In response, ICAP argues that it is not required to amend its constitution to comply with the SICDA FOR and the BMD Rules on foreign shareholding. ICAP submits that the word 'member' in its constitution includes both local and foreign members, and the absence of the word 'foreign' does not negate the applicability of the limit to foreign shareholders. ICAP maintains that para 21(2) of its constitution, which states that no member shall

hold more than 20% of the total issued capital of the company, sufficiently complies with the SC CEF Guidelines and para 7.40 of the MMLR, which impose a 20% limit on shareholding in closed-end funds.

[90] Having carefully considered the submissions of both parties and the applicable legal provisions, I find that ICAP is not required under the law to expressly amend its constitution to incorporate a prescribed limit on foreign shareholding before imposing a 20% restriction on foreign shareholding in the company.

[91] The SICDA FOR and the BMD Rules are subsidiary legislations that form an integral part of the comprehensive regulatory framework governing the securities industry in Malaysia. These regulations, along with the primary legislations such as the CA 2016 and the Capital Markets and Services Act 2007 ('the CMSA'), must be read together harmoniously to give effect to the overall regulatory objectives of promoting a fair, efficient, and transparent securities market.

[92] The CMSA, in its preamble, states that it is '[a]n Act to consolidate the Securities Industry Act 1983 and Futures Industry Act 1993, to regulate and to provide for matters relating to the activities, markets and intermediaries in the capital markets, and for matters consequential and incidental thereto'. This demonstrates the legislative intent to create a unified and coherent regulatory framework for the securities industry.

[93] Section 2(1) of the CMSA defines 'securities laws' to include, among others, the CMSA itself, the Securities Commission Malaysia Act 1993, the Securities Industry (Central Depositories) Act 1991 ('the SICDA'), and any other regulations made under these acts. This broad definition underscores the need to interpret and apply the various legislations and regulations in a harmonious manner to achieve the desired regulatory outcomes.

[94] In this context, the term 'member' used in ICAP's Constitution, the SC CEF Guidelines and MMLR should be interpreted broadly to encompass both local and foreign shareholders. This interpretation is consistent with the principle of statutory construction that words in the singular include the plural, as provided in s 4(3) of the Interpretation Acts 1948 and 1967, which states:

> Words in the singular include the plural, and words in the plural include the singular.

[95] By applying this principle, the term 'member' in the relevant provisions should be read to include both local and foreign members, unless there is a clear

indication to the contrary. This approach ensures that the regulatory requirements are applied consistently to all shareholders, regardless of their nationality, and promotes a level playing field in the securities market.

[96] Moreover, the SICDA FOR and the BMD Rules, which specifically deal with foreign ownership of securities, should be interpreted in a manner that complements and reinforces the general provisions of the CA 2016 and the SC CEF Guidelines. Pursuant to reg 2 of the SICDA FOR, foreign ownership is defined as ownership by a 'foreigner', defined as amongst others:

(a) an individual who is not a citizen of Malaysia;

(b) a body, corporate or unincorporate, which is incorporated or constituted, as the case may be, outside Malaysia;

(c) a nominee company incorporated in Malaysia which is identified with the word '(Asing)' in its name and performs nominee, agent or trustee services solely for foreign legal or beneficial owners of securities; or

(d) a company, other that (c) above, incorporated in Malaysia where more than 50% of the voting rights are controlled by the persons/entities described in, amongst others, (a) and (b).

[97] This definition, read together with the provisions of the BMD Rules, particularly Chapter 24A on foreign ownership of securities in listed issuers, provides the operational framework for the regulation of foreign shareholding in Malaysian companies. However, these specific regulations should not be construed in isolation, but rather as part of the broader regulatory framework that includes the CA 2016, the CMSA, and the SC CEF Guidelines.

[98] The SC CEF Guidelines, issued pursuant to s 377 of the CMSA, set out the requirements for the offering and listing of closed-end funds in Malaysia. Paragraph 3.7.1(iii) of the SC CEF Guidelines mandates that the memorandum and articles of association of a closed-end fund shall provide that no shareholder shall hold more than 20% of the total issued and paid-up shares of the fund. This requirement, which is mirrored in para 7.40 of the MMLR applies to all shareholders, both local and foreign, and is intended to ensure a diversified shareholding structure and prevent any single shareholder from exerting undue control over the fund.

[99] In this context, ICAP's constitution, particularly para 21(2), which states that 'no member shall hold more than 20% of the total issued capital of the company,' should be interpreted as applying to both local and foreign members. This interpretation is consistent with the objectives of the SC CEF Guidelines and the MMLR, and ensures that the 20% limit on shareholding is enforced uniformly across all shareholders.

[100] Therefore, the SICDA FOR and the BMD Rules, as subsidiary legislations, must be read harmoniously with the primary legislations such as the CA 2016 and the CMSA, as well as the SC CEF Guidelines and the MMLR, to give effect to the overall regulatory objectives of promoting a fair, efficient, and transparent securities market. The term 'member' used in ICAP's constitution, the SC CEF Guidelines, and the MMLR should be interpreted broadly to include both local and foreign shareholders, in line with the principle of statutory construction that words in the singular include the plural. This interpretation ensures that the regulatory requirements are applied consistently to all shareholders and promotes a level playing field in the securities market.

[101] Paragraph 21(2) of ICAP's constitution, which reads:

> Notwithstanding anything contained in this constitution to the contrary, no member shall hold more than 20% of the total issued capital of the company.

is a clear manifestation of ICAP's compliance with the SC CEF Guidelines and para 7.40 of the MMLR.

[102] Paragraph 3.7.1(iii) of the SC CEF Guidelines states:

> The memorandum and articles of association of the closed-end fund shall provide for the following:
>
> ... (iii) That no shareholder of the closed-end fund shall hold more than 20% of the total issued and paid-up shares of the closed-end fund ...

[103] Similarly, para 7.40 of the MMLR provides:

> No shareholder of a closed-end fund shall hold more than 20% of the total number of issued shares of the closed-end fund.

[104] These provisions impose a 20% limit on shareholding in closed-end funds, which applies to all shareholders, irrespective of their nationality. The term 'member' used in para 21(2) of ICAP's constitution and the term 'shareholder' used in the SC CEF Guidelines and the MMLR are inherently inclusive and cover both local and foreign shareholders.

[105] The absence of the word 'foreign' in these provisions does not preclude their application to foreign shareholders. The language used in these provisions is broad and all — encompassing, indicating that the 20% limit applies to any shareholder, regardless of their nationality. If the intention was to exclude foreign shareholders from the purview of these provisions, it would have been explicitly stated.

[106] Moreover, the purpose of the 20% shareholding limit is to ensure a diversified shareholding structure and prevent any single shareholder, whether local or foreign, from exerting undue control over the closed-end fund. This objective would be undermined if foreign shareholders were exempted from the limit, as it would create an uneven playing field and potentially allow foreign shareholders to acquire a controlling stake in the fund.

[107] The fact that para 21(2) of ICAP's constitution does not specifically mention 'foreign shareholders' does not mean that it is not applicable to them. The term 'member' is a generic term that encompasses all shareholders, and in the absence of any qualifying words, it should be given its plain and ordinary meaning, which includes both local and foreign shareholders.

[108] ICAP's imposition of the 20% limit on foreign shareholding is a valid exercise of its powers under the SC CEF Guidelines, the MMLR and its own constitution. The SC CEF Guidelines, issued pursuant to s 377 of the CMSA, set out the requirements for the offering and listing of closed-end funds in Malaysia.

[109] These provisions clearly mandate that a closed-end fund must impose a 20% limit on shareholding, which applies to all shareholders, including foreign shareholders. As a listed closed-end fund, ICAP is bound by these requirements and must ensure that its Constitution and practices are in compliance with the SC CEF Guidelines and the MMLR.

[110] The letter from the Securities Commission dated 6 June 2005, exhibited as 'A1' in Tan Mun Lin's affidavit in reply affirmed on 24 November 2023, approving ICAP as a listed closed-end fund, is a strong indication that ICAP's constitution and practices have been vetted and found to be in compliance with the relevant guidelines and listing requirements, including the provisions relating to foreign shareholding limits. The Securities Commission, as the regulatory authority responsible for the supervision and monitoring of the capital markets in Malaysia, has the power under s 15 of the Securities Commission Malaysia Act 1993 to approve the establishment of closed-end funds and to impose such conditions or restrictions as it deems fit.

[111] The fact that the Securities Commission has approved ICAP as a listed closed-end fund demonstrates that ICAP has satisfied the regulatory requirements, including the requirement to impose a 20% limit on shareholding as mandated by the SC CEF Guidelines and the MMLR. This approval is a recognition that ICAP's constitution and practices are in compliance with the relevant guidelines and listing requirements, and that the imposition of the 20% limit on foreign shareholding is a valid exercise of its powers under these regulatory instruments.

[112] Moreover, para 21(2) of ICAP's constitution, which states that 'no member shall hold more than 20% of the total issued capital of the company,' provides the necessary constitutional basis for ICAP to impose the 20% limit on foreign shareholding. This provision, when read together with the SC CEF Guidelines and the MMLR, clearly empowers ICAP to take the necessary steps to ensure that the shareholding limit is adhered to by all shareholders, including foreign shareholders.

[113] It appears that Pop's reliance on reg 2 of the SICDA FOR to argue that ICAP must expressly incorporate a prescribed limit on foreign shareholding in its constitution is not correct. Regulation 2 of the SICDA FOR defines 'prescribed limit' as:

> a quota, restriction or limit on the ownership of shares by a foreigner imposed on the issuer by the memorandum and articles of association or any other constituent document of the issuer.

[114] While this definition may suggest that a prescribed limit on foreign shareholding must be expressly stated in a company's constitution, para 21(2) of its existing constitution, read together with para 7.40 of the MMLR and para 3.7.1(iii) of the SC CEF Guidelines, provides a valid basis for imposing the 20% limit on foreign shareholding.

[115] The term 'member' in para 21(2) of ICAP's constitution should be construed broadly to encompass both local and foreign shareholders, consistent with the MMLR and SC CEF Guidelines, which impose a 20% limit on shareholding in closed-end funds without distinguishing between local and foreign shareholders. ICAP's compliance with these provisions and the approval from the Securities Commission, as evidenced by the letter dated 6 June 2005, demonstrate that its practices are consistent with the regulatory framework governing closed-end funds, without the need for an express provision in its constitution limiting foreign shareholding.

[116] More importantly, even if r 7.40 of the MMLR is not expressly stated in ICAP's constitution, it is deemed to have been incorporated by virtue of r 7.36(4) of the MMLR, which provides:

> If the Listing Requirements require this constitution to contain a provision and it does not contain such a provision, this constitution is deemed to contain that provision.

[117] This deeming provision effectively incorporates r 7.40 into ICAP's constitution, regardless of whether it is expressly stated therein. As a result,

ICAP's constitution is deemed to contain the 20% shareholding limit mandated by r 7.40, which applies to all shareholders, including foreign shareholders.

[118] The deeming provision in r 7.36(4) of the MMLR ensures that closed-end funds comply with the mandatory requirements set out in the MMLR, even if their constitutions do not expressly incorporate such provisions. This mechanism promotes consistency and uniformity in the application of the listing requirements across all listed closed-end funds.

[119] Given that r 7.40 of the MMLR is deemed to be incorporated into ICAP's constitution by virtue of r 7.36(4), this fortifies the position that ICAP is not required to amend its constitution to expressly include the 20% limit on foreign shareholding before enforcing such a limit. The deemed incorporation of r 7.40 provides a valid basis for ICAP to impose the 20% limit on foreign shareholding, in compliance with the MMLR and the SC CEF Guidelines.

[120] Furthermore, the BMD Rules, which are part of the regulatory machinery established to carry out the objectives of the SICDA FOR, do not mandate that a company must expressly incorporate a prescribed limit on foreign shareholding in its constitution before imposing such a limit.

[121] The BMD Rules are issued by Bursa Malaysia Depository Sdn Bhd pursuant to s 9 of the SICDA, which empowers the central depository to make rules in consultation with the Securities Commission to ensure orderly and expeditious dealings in securities deposited or lodged with the central depository. These rules form part of the regulatory framework governing the securities industry in Malaysia and must be read together with the SICDA FOR and other relevant legislations.

[122] Chapter 24A of the BMD Rules, which deals specifically with foreign ownership of securities in listed issuers, does not contain any provision that requires a company to expressly incorporate a prescribed limit on foreign shareholding in its constitution before imposing such a limit. Instead, r 24A.02 of the BMD Rules provides for the classification of issuers imposed with the prescribed limit on foreign ownership, stating:

> (1) Representation by issuer: The Depository shall classify an issuer as being imposed with the prescribed limit based solely on the representation as to the existence of the prescribed limit made by the issuer to the Depository.
>
> (2) Suspension of restricted shares: In reliance of the representation made by an issuer pursuant to Rule 24A.02(1), the Depository shall place restricted shares issued by such issuer and standing to the credit of the securities account of a foreign depositor as being in suspense in accordance with the Foreign Ownership Regulations.

[123] This provision clearly indicates that the central depository shall classify an issuer as being imposed with the prescribed limit on foreign ownership based on the representation made by the issuer, without requiring the limit to be expressly incorporated in the issuer's constitution. The BMD Rules, therefore, do not mandate the express incorporation of the prescribed limit in the company's constitution as a prerequisite for imposing such a limit.

[124] Moreover, r 24A.05 of the BMD Rules, which deals with the compliance with reg 6 of the SICDA FOR, states:

> (1) Compliance with Regulation 6 of Foreign Ownership Regulations: Every issuer shall do all such acts and things as may be necessary in order to comply with Regulation 6 of the Foreign Ownership Regulations.

[125] This rule requires issuers to comply with reg 6 of the SICDA FOR, which sets out the procedures for determining the voting rights and other entitlements of foreign shareholders in respect of their restricted shares. However, it does not stipulate that the prescribed limit on foreign ownership must be expressly incorporated in the company's constitution for such compliance to be effective.

[126] The BMD Rules, particularly Chapter 24A, are meant to implement the provisions of the SICDA FOR and provide the operational mechanism to complement the regulations made by the Minister, including the SC CEF Guidelines. The SC CEF Guidelines, which are issued pursuant to s 377 of the CMSA, impose a 20% limit on shareholding in closed-end funds, which applies to all shareholders, including foreign shareholders.

[127] The BMD Rules, in facilitating the implementation of the SICDA FOR and complementing the SC CEF Guidelines, do not require the express incorporation of the prescribed limit on foreign shareholding in the company's constitution. Instead, they provide the operational framework for the classification of issuers imposed with the prescribed limit, the suspension of restricted shares, and the compliance with the procedures for determining the voting rights and other entitlements of foreign shareholders.

[128] In conclusion, based on the reasons set out above, while the court found that Pop had the requisite legal standing to bring this action under s 351 of the CA 2016, I find that ICAP is not required under the law to expressly amend its constitution to incorporate a prescribed limit on foreign shareholding before imposing a 20% restriction on foreign shareholding in the company. ICAP's existing constitution, particularly para 21(2), read together with the MMLR, the SC CEF Guidelines, and the SICDA FOR, provides a valid basis for imposing the 20% limit on foreign shareholding. The term 'member' in these provisions should be construed broadly to encompass both local and foreign

A shareholders, consistent with the objectives of the regulatory framework governing closed-end funds. Furthermore, r 7.40 of the MMLR, which imposes a 20% limit on shareholding in closed-end funds, is deemed to be incorporated into ICAP's constitution by virtue of r 7.36(4) of the MMLR, thereby fortifying ICAP's position. ICAP's compliance with these provisions
B and the approval from the Securities Commission demonstrate that its practices are consistent with the applicable laws and regulations, without the need for an express provision in its constitution limiting foreign shareholding. Consequently, I find that ICAP's imposition of the 20% limit on foreign shareholding is lawful and does not amount to a breach of its constitution or
C the CA 2016. ICAP's announcements and notices regarding the 20% restriction on foreign shareholding and its impact on the voting rights of foreign shareholders are therefore valid. As such, the plaintiff's prayers in the originating summons for declaratory and injunctive reliefs against the
D defendant's imposition of the 20% limit on foreign shareholding, and for orders relating to the validity of the resolutions passed at the AGM, are hereby dismissed in their entirety with costs.

[129] Pop is ordered to pay costs of RM25,000 to ICAP.

E

Enclosure 17

[130] The notice of application in encl 17 was filed by Pop seeking an inter partes injunction against ICAP pending the full disposal of the originating
F summons. The primary purpose of this application was to preserve the status quo by restraining the defendant from imposing and implementing a 20% limit on foreign shareholding, and from restricting the voting rights of foreign shareholders, until the court could fully hear and determine the merits of the case as presented in the originating summons.

G

[131] However, as the originating summons has now been dismissed on its merits, the interim injunction sought in encl 17 has become academic. The court's decision to dismiss the substantive claims in the originating summons
H effectively removes the basis for granting any interim relief.

[132] Furthermore, the findings of the court in dismissing the originating summons are equally applicable to encl 17. The court has determined that ICAP's imposition of the 20% limit on foreign shareholding is lawful and does
I not amount to a breach of its constitution or the Companies Act 2016. This finding directly addresses the core issues raised in encl 17 and demonstrates that there are no serious questions to be tried. The lack of merit in the substantive case, as established in the court's decision on the originating summons, precludes the granting of an interim injunction.

[133] In light of these considerations, the application in encl 17 for an inter partes injunction is dismissed with no order as to costs.

Enclosure 1 dismissed with costs of RM25,000 to be paid by Pop to ICAP; encl 17 dismissed with no order as to costs.

Reported by Dzulqarnain Ab Fatar